

## Q&A

### ECCHR's 2022 Communication to the International Criminal Court on crimes against migrants and refugees in the context of the Situation in Libya

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#### Interceptions at Sea as Crimes against Humanity

##### 1. What is ECCHR's 2022 Communication to the ICC in the context of the Situation in Libya about?

ECCHR's 2022 Communication to the ICC provides detailed information and legal analysis on the alleged commission of grave crimes against migrants, refugees and asylum seekers intercepted in maritime operations in the Central Mediterranean Sea and returned to and detained in Libya. It argues that the interceptions and returns are not sea rescue operations, nor merely preceding acts that causally contribute to subsequent criminal conduct, but rather themselves constitute crimes against humanity in the form of the severe deprivation of physical liberty (Article 7(1)(e) of the Rome Statute).

The Communication details 12 exemplary incidents of interceptions of migrants and refugees at sea and their return to and detention in Libya between 2018 and 2021, particularly highlighting the decisive role played by officials of EU agencies and Member States in providing support to and collaborating with Libyan actors also involved in the interceptions and returns. Since 2016, EU agencies and Member States have increased their capacity-building and operational support for the so-called Libyan Coast Guard by providing funding, patrol boats, equipment and training, as well as by directly participating in specific interceptions through, for instance, providing information on the location of boats in distress. The alleged perpetrators of these grave crimes are also identified in the Communication, including high-ranking officers of EU agencies and officials of EU Member States, as well as high-ranking Libyan actors.

##### 2. What crimes are alleged in the Communication?

Based on available evidence, ECCHR argues that the **interceptions of migrants and refugees at sea in the Central Mediterranean and their return to and detention in Libya constitute crimes against humanity in the form of the severe deprivation of physical liberty in violation of fundamental rules of international law** (Article 7(1)(e) of the Rome Statute). It establishes that the severe deprivation of migrants and refugees' physical liberty, under the coordination of Libyan actors and officials of EU Member States and EU agencies, begins from the point when they are intercepted at sea, and continues as they are returned to Libya, where they are systematically transferred to detention facilities. This deprivation of liberty is to be considered severe because it violates fundamental rules of international law, including the

principle of non-refoulement, the right to be free from arbitrary detention, and the right to a fair trial.

To qualify as crimes against humanity, the alleged criminal conduct must occur as part of a widespread or systematic attack against a civilian population. This Communication argues that the interception of migrants and refugees at sea and their return to and detention in Libya constitute part of the same widespread and systematic attack against migrants and refugees in Libya since 2011 identified in the [joint 2021 Communication to the ICC by ECCHR, FIDH and LFJL](#).

Since 2011, a broad criminal system aimed at the exploitation of migrants and refugees and enacted through their subjection to violence and inhumane living, detention, and transport conditions, has developed in Libya. The methods employed in the exploitation of and violence against migrants and refugees – including detention, torture, murder, persecution, sexual violence, enslavement and other inhumane acts – are not singular or isolated, but rather part of a course of conduct. The attack is systematic in that it follows clear patterns and the crimes are committed in pursuance of an apparent policy, implemented by Libyan state and non-state actors alike. This policy is grounded foremost in Law No. 19 of 2010, which authorizes the detention and forced labor of migrants and refugees, but is also evident through other agreements and patterns of conduct. The attack is widespread, as it is directed against thousands of migrants and refugees of different nationalities, religions, genders, racial, and ethnic groups, across the entire Libyan territory and – through interceptions and returns – also at sea, spreading across not only Libyan waters but also international waters, including the Libyan, Maltese, and Italian Search and Rescue (SAR) zones.

Interceptions at sea of migrants and refugees fleeing Libya for the purpose of returning them to Libyan territory are part of this course of conduct. The interceptions and returns are widespread and carried out in a systematic manner, evident in their well-documented repetition and patterns of conduct. Once migrants and refugees are intercepted at sea and deprived of their liberty, it is virtually certain that they will be returned to Libya and put into detention facilities through [“a systematic transfer”](#) and remain there for indefinite periods of time, subjected to international crimes. In this way, interceptions and returns form part of a broader system of exploitation and abuse, in which migrants and refugees are the main “commodity.”

### **3. Who are the suspected perpetrators of these crimes?**

In accordance with the OTP’s strategic approach, the Communication identifies a number of **high-ranking officials of EU agencies and EU Member States as well as Libyan actors** that are the [“most responsible”](#) and analyzes their mode of liability in terms of co-perpetration. The standards set by Article 25(3)(a) of the Rome Statute and ICC jurisprudence require the existence of a common plan between the co-perpetrators, that each of them intentionally provides an essential contribution to the crime, and that they are aware of the common plans’ results and the joint control they have over it.

The Communication assesses available documentation indicating the existence of a common plan between EU agencies and Member States’ officials and Libyan actors to intercept migrants and refugees fleeing via the Central Mediterranean route with the aim of containing them in Libya. The essential contributions provided by the alleged co-perpetrators include, on the one hand, the establishment of frameworks of cooperation between EU officials and internationally recognized Libyan authorities, such as Memoranda of Understanding, and on the other hand, the provision of material, capacity building, and operational support, including information on the location of migrants and refugees in distress at sea obtained through surveillance activities.

The list of alleged co-perpetrators includes:

- Former and present Maltese Prime Ministers, the Head of Plans and Intelligence of the Armed Forces of Malta (AFM), a former Special Envoy to the Maltese Prime Minister, and members of Malta's Rescue Coordination Center (RCC) and the AFM;
- Former and present Italian Ministers of the Interior, a former Chief of Staff for the Minister of the Interior, the Commander General of the Italian Coast Guard, the Commander of Maritime Rescue Coordination Center (MRCC) Rome, and members of the Italian MRCC;
- The Operation Commander of EUNAVFOR MED Operation Sophia, the Force Commander of EUNAVFOR MED Operation Sophia, and crew members of EUNAVFOR MED aerial and naval assets;
- A former High Representative of the Union for Foreign Affairs and Security Policy; a former European External Action Service (EEAS) Deputy Secretary General, a former Chairperson of the EU Political and Security Committee (PSC);
- A former Frontex Executive Director, a Frontex Head of Surveillance Sector, a Frontex Head of Situation Center (FSC), a Frontex Head of Situational Awareness and Monitoring Division, members of Joint Operation Themis, members of Frontex's Multipurpose Aerial Surveillance (MAS), and members of Frontex's Management Board;
- Former Prime Minister and Defense Minister of Libya's Government of National Accord (GNA), the current Prime Minister and Defense Member of Libya's Government of National Unity (GNU), a GNA Foreign Minister, GNA Interior Minister, GNA Deputy Prime Minister, former GNA Minister of Defense, former and current Head of the Directorate for Combating Illegal Migration (DCIM), members of militias and armed groups operating nominally under the DCIM, members of the so-called Libyan Coast Guard, and crew members of Libyan-flagged merchant vessels

The list of alleged perpetrators and the modes of responsibility outlined in the Communication are not exhaustive. Due to the opaque nature of various European agencies, particularly Frontex, it is crucial that the ICC uses its investigative powers to obtain information and evidence that cannot be gained by civil society actors or national prosecutors. This Communication's assessment of the individual responsibility of alleged perpetrators under Art. 25(3)(a) is also without prejudice to any other findings regarding alleged perpetrators being investigated by the OTP, in relation to whom the Prosecutor may find other modes of liability suitable.

#### **4. What factual information and data is the Communication based on?**

The Communication provides a thorough analysis of the evolution of EU and certain Member States' border and migration management policies in relation to Libya (see Question 6). Since at least 2016, the cooperation between EU agencies, EU Member States, and internationally recognized Libyan authorities have focused on increasing the capacity of Libyan actors to conduct interceptions of migrants and refugees at sea.

The Communication describes how this cooperation plays out in reality by reconstructing **12 exemplary incidents of the interception of migrants and refugees at sea and their return to and detention in Libya between 2018 and 2021**. The incidents were chosen because they present a particularly clear and detailed picture of the cooperation, on both policy and

operational levels, between EU Member States, EU agencies, and Libyan actors in carrying out the interceptions and returns.

The incidents covered include interceptions that began on the dates: 28 February 2018, 7 November 2018, 10 April 2019, 2 May 2019, 18 October 2019, 12 February 2020, 13-14 April 2020, 14 July 2020, 10 February 2021, 28 March 2021, 21 April 2021, and 30 July 2021.

The presentation and analysis of these incidents is based on operational documentation and factual and legal research conducted by ECCHR and various organizations, including Sea-Watch, Initiative Watch the Med–Alarm Phone, Mediterranean, Open Arms, Border Forensics, Frag den Staat, Amnesty International, Human Rights Watch, and Lighthouse Reports. It also draws on additional information collected and analyzed from reliable public reports and open-source data, for example, from UN bodies such as the UN High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the Office of the UN High Commissioner for Human Rights (OHCHR), the Independent Fact-Finding Mission on Libya (FFM), the UN Special Rapporteur on the human rights of migrants, the UN Support Mission in Libya (UNSMIL), and the UN Panel of Experts on Libya. [Data](#) gathered by UNHCR and IOM, in particular, provides key insights into the disembarkation and transfer to detention centers of migrants and refugees in Libya, which, while not exhaustive, is indicative of the systematicity of migrants and refugees’ transfer to detention upon their disembarkations in Libya after interceptions at sea.

Other sources included EU internal reports, documents or datasets obtained through publicly available platforms or Freedom of Information Act (FOIA) [requests](#). The findings of the [report](#) of the European Anti-Fraud Office (OLAF) investigating Frontex misconduct also provided helpful insight into Frontex’s general internal operation. Via Frag den Staat, ECCHR was able to obtain access to the Frontex Joint Operations Reporting Application (JORA) database, which documents events that took place at the EU’s external borders. Nonetheless, the opaque nature of the operation of several European entities (particularly Frontex) makes it difficult for civil society organizations to obtain information through publicly available sources and FOIA requests. This also highlights the crucial importance of the ICC’s investigative powers, through which it may be able to obtain confidential information that is otherwise unattainable.

Through the analysis of these incidents, the Communication argues that the interceptions at sea, returns to, and detention of migrants and refugees in Libya amount to the crime against humanity of severe deprivation of liberty (See Question 2). Therefore, ECCHR urges the OTP to investigate these allegations and to prioritize the collection and preservation of this documentation and data with a view toward its use as admissible evidence. In doing so, it should consider any associated risks and take necessary measures to protect victims and witnesses.

## **5. What is an interception at sea and how does it differ from a rescue operation?**

In this Communication, “interception” is defined as the physical act of apprehending migrants and refugees in distress at sea for the purpose of returning them to Libya. **The intent to return migrants and refugees in distress at sea back to Libya, clearly an unsafe location, renders maritime operations that might otherwise be considered rescue operations as “interceptions.”** Core provisions of international maritime law, international search and rescue regulations, international refugee law, and international human rights law, particularly the principle of non-refoulement, forbid the return of people in distress at sea to a country where they are likely to face serious risk to their safety or the exercise of their human rights.

Obligations contained in the International Convention for the Safety of Life at Sea and the 1979 International Convention on Maritime Search and Rescue require that people in distress at sea be rendered assistance and delivered to a “place of safety” in conditions that uphold their human rights, including adherence to the principle of non-refoulement. According to Resolution MSC.167(78) of the International Maritime Organisation (IMO), which gives guidance on the treatment of persons rescued at sea (“IMO Guidelines”), such a “place of safety” should be a location where, at the very least, survivors’ safety of life is no longer threatened, where their basic human needs can be met, and from where arrangements can be made for their transportation to their next or final destination. Customary international law prohibits states from carrying out refoulements, irrespective of migration status, with specific enforceable provisions found, inter alia, in the International Covenant for Civil and Political Rights, the Convention against Torture, and the 1951 Refugee Convention.

Interceptions at sea and returns to Libya of migrants and refugees are a violation of the principle of non-refoulement. It is well documented that Libya does not meet the criteria for being designated as a “place of safety” for the purpose of disembarkation of people rescued at sea. Various United Nations agencies and officers have clarified this point, including the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), and the UN Secretary General in his reports to the UN Security Council on the implementation of Resolution 2437 (2018). In 2012, in *Hirsi Jamaa and others v. Italy* (Application no. 27765/09), the Grand Chamber of the European Court of Human Rights also confirmed that migrants and refugees disembarked in Libya faced risk of ill-treatment and arbitrary detention in inhuman conditions. The Council of Europe Commissioner for Human Rights has also concluded the same.

#### **6. What do EU and Member States’ policies have to do with the crimes ECCHR is alleging in the Communication?**

For years, the Central Mediterranean route has been considered one of the world’s deadliest migration routes. According to the Missing Migrants Project, over 20,000 migrants and refugees – who turned to this route due to a lack of legal pathways to access protection – have died or gone missing on this route since 2014. While this tragedy has many intersecting causes, the decision of EU Member State governments and EU agencies to prioritize border control over sea rescue in the Mediterranean in recent decades has likely played a key role. Since the early 2000s, the EU and certain EU Member States, such as Italy and Malta, have enacted migration management policies seeking to combat irregular migration to Europe. This has included evolving policies of engagement with Libyan authorities and entities to keep migrants and refugees from fleeing Libya via the Central Mediterranean and to return those who do.

The engagement with Libya by EU agencies (including the EU Commission, EUNAVFOR MED and Frontex) and Member States (like Italy and Malta) has largely been driven by the latter’s interest in avoiding the legal obligations triggered when people seeking protection arrive in EU Member States or come under their control at sea. **From 2016 onwards, EU agencies and Member States began to significantly increase their provision of material, capacity-building and operational support to Libyan actors, such as the so-called Libyan Coast Guard (scLCG), to contain migrants and refugees in Libya, inter alia, through their interception at sea and return to Libyan territory.** As detailed in the Communication, these actions have resulted in the alleged commission of crimes against humanity. The operational support provided has included giving distress location information to the scLCG and even coordinating interceptions in specific incidents. Such support shows the decisive role that officials of EU Member States and EU agencies play in interceptions of migrants and refugees at sea and their subsequent return to Libya, the very place from which they fled.

## 7. What is the aim of ECCHR's work on this case?

With this Communication, ECCHR requests the OTP to investigate the alleged crimes against humanity committed against migrants and refugees at sea and subsequently in Libya, including those perpetrated by high-ranking officials of EU member states and EU agencies. ECCHR strives towards an ICC that fulfils its promise of accountability to survivors, victims and affected communities, including migrants and refugees who have been victims of grave crimes in Libya. In striving for accountability of high-ranking officials of EU agencies and Member States for acts that amount to crimes against humanity, ECCHR's work on this case also seeks to expose double standards in the application of international criminal law and the role of powerful actors in the commission, investigation and prosecution of international crimes.

European migration management policies and practices in the Central Mediterranean currently involve the commission of crimes against humanity, an appalling reality that must come to an end. Dominant State narratives portray the policies and practices of EU agencies and Member States in the Central Mediterranean – specifically the interception of migrants and refugees in distress at sea and their return to Libya – as genuine search and rescue operations, valid efforts to combat human trafficking, and legitimate measures for transnational migration management. This Communication presents evidence and analysis challenging this narrative by arguing that such interceptions and returns to Libya instead constitute serious international crimes – crimes against humanity – co-perpetrated by high-ranking officials of EU agencies and Member States, along with internationally recognized Libyan authorities.

## 8. Why is this a case for the International Criminal Court?

**The ICC is the only possible avenue for breaking the cycle of impunity and assessing the individual criminal responsibility of high-level perpetrators.** So far, domestic authorities in Libya have failed to investigate these crimes and prosecute those responsible. Moreover, Libya lacks appropriate legislation regarding international crimes, and its justice system has been weakened by a decade of ongoing armed conflict and the absence of unitary and recognized institutions. With regard to crimes against migrants and refugees, the Libyan judiciary has limited its inquiry strictly to smuggling and trafficking, which fails to address the widespread and systematic nature of these crimes, the gravity of the conduct, and the complicity of state actors. In Europe, Malta and Italy are the main fora for the incidents considered, including for Frontex and EUNAVFOR MED personnel. Both countries, however, have proven unable and/or unwilling to investigate and prosecute crimes against humanity against migrants and refugees intercepted at sea and returned to Libya, particularly when European nationals have allegedly been involved.

ECCHR welcomes the efforts and progress of the Joint Team – composed by the OTP, Europol, and national authorities of Italy, the Netherlands, United Kingdom, and Spain – in investigating crimes against migrants and refugees in the Libyan context (See Question 10). However, most recent extraditions of suspects have focused only on transnational crimes and in particular on trafficking. While an important first step to guarantee victims' and survivors' right to justice, this approach runs the risk of erasing the grave, coordinated, and systematic aspect of the violence against migrants and refugees and diluting the involvement of officials of EU agencies and Member States.

**An ICC investigation into the matter is urgently needed.** The ICC is the best-placed institution to conduct a thorough and complete investigation into the complex network of collaboration between European and Libyan actors and the resulting commission of grave

crimes, including by high-level perpetrators. Only the ICC can properly deal with the structural dimension of the crimes committed beyond the responsibility of low-level perpetrators and hold accountable those at higher echelons, whose immunities could sometimes bar prosecution in European or Libyan domestic courts.

#### **9. How can survivors or witnesses of the crimes alleged in this Communication exercise their rights and seek justice?**

For the crimes outlined in the 2022 Communication, **survivors or witnesses connected to any of the 12 incidents could potentially exercise their rights to contribute to the criminal investigations** through the submission of official testimonies or other forms of evidence, before the ICC or national authorities.

ECCHR has already been supporting survivors of crimes against migrants and refugees in Libya linked to the [2021 Communication](#) submitted to the ICC together with FIDH and LFJL. We are continuously in exchange with survivors and hope that more will be able to exercise their rights, become part of criminal investigations, and provide formal witness statements. It is fundamental that survivors are able to live in safe and stable conditions and circumstances and have access to legal and, if needed, psycho-social support.

#### **10. Why is an ICC investigation needed if there is already a Joint Team for investigating crimes against migrants and refugees in Libya?**

In September 2022, the ICC OTP joined the [Joint Team](#) of European national authorities (Italy, the Netherlands, the United Kingdom of Great Britain and Northern Ireland, and Spain) and Europol aimed at supporting investigations into crimes against migrants and refugees in Libya. As part of the Joint Team's efforts, in October 2022, [two suspects](#) allegedly involved in human trafficking of migrants and refugees in Libya were arrested in Ethiopia and extradited to Italy and the Netherlands, respectively. While ECCHR applauds the efforts by the [Joint Team](#) that led to this result, it is clear that the ICC is still the only forum capable of investigating and prosecuting crimes against humanity committed against migrants and refugees in the Libyan context. As evinced by the two recent arrests and extraditions, **many national authorities still charge suspects under human trafficking and smuggling crimes rather than crimes against humanity, which, though important, falls short of capturing the complex and systematic nature of the system of exploitation and abuse experienced by migrants and refugees in the Libyan context.** Doing so also fails to account for the role played by high-ranking officials of EU agencies and Member States in this system.

Many national jurisdictions are not currently equipped to prosecute crimes against humanity. For example, Italy lacks the appropriate legislation needed to do so. While the Netherlands has legislation incorporating the principle of universal jurisdiction into its domestic legal framework that allows the prosecution of crimes against humanity, it requires a suspect to already be present within the territory of the Netherlands, thus hindering the law's practical application against suspects whose location is known, but elsewhere. Hence, the ICC must do more. The ICC not only has the proper legal framework, but also the tools and opportunities required to conduct larger investigations into the complex criminal networks involved and to reach high-ranking perpetrators. When it comes to suspected high-ranking European officials, the ICC is also best suited to bypass potential claims of immunity by heads of state in national courts and to overcome political impediments that may affect domestic proceedings. Yet, from the ICC Chief Prosecutor's [report](#) to the UN Security Council in November 2022, it seems that the ICC's strategy regarding "crimes against migrants" is still to cooperate with and delegate the prosecution to national authorities. ECCHR's 2022 Communication to the ICC elaborates

on the inadequacy of this approach and urges the OTP to step up its efforts in investigating and prosecuting crimes against migrants and refugees in the Situation in Libya, with a particular focus on high-ranking European nationals suspected in these crimes.

During his briefing to the UN Security Council on 11 November 2022, ICC Chief Prosecutor Karim Khan [stated](#) that further applications for warrants of arrest are being submitted to the ICC judges in the context of the Situation in Libya. While it seems clear that the arrest warrants are linked to crimes in detention facilities, it is unclear whether the alleged criminal conduct relates to migrants and refugees specifically. Based on publicly available information, it is most likely that the arrest warrants target Libyan individuals, as opposed to officials from EU Member States and EU agencies. Though ECCHR welcomes these developments, **ICC investigations must also focus on the particular vulnerability of migrants and refugees as a group under attack in the Libyan context, as well as on the essential role of officials from EU Member States and EU agencies in the crimes occurring against them**, especially the severe deprivations of liberty that occur when they are intercepted at sea and returned to and detained in Libya. The ICC must step in to end impunity and ensure victims' access to justice.

**11. Do the crimes alleged in this Communication relate to the ICC's policy focus on crimes against children and efforts to combat crimes involving sexual and gender-based violence?**

Interceptions of migrants and refugees at sea – which include women and children – and their return to Libya lead to their systematic transfer to detention centers upon disembarkation in Libya. In these detention centers, other crimes against humanity are rife and well-documented. ECCHR's [2021 Communication](#) to the ICC, filed together with FIDH and LFJL, includes first-hand testimonies and analysis of other crimes against humanity in detention centers in Libya, including different forms of sexual and gender-based violence as well as crimes against children. While **none of the migrants and refugees intercepted at sea and returned to Libya should face arbitrary detention, it is notable that there are no particular safeguards for underage children or unaccompanied minors intercepted at sea**; they are treated as adults and sent to the same detention centers and therefore subjected to the same violations/crimes as adults upon their disembarkation in Libya.